No. 09-1191

In the Supreme Court of the United States

ANTWON DANIELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court correctly ruled that evidence of an AK-47 assault rifle found in petitioner's house was admissible under the inevitable discovery exception to the exclusionary rule.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Mincey v. *Arizona*, 437 U.S. 385 (1978) 7
Miranda v. *Arizona*, 384 U.S. 436 3
Minnesota v. *Olson*, 495 U.S. 91 (1990) 7
Nix v. *Williams*, 467 U.S. 431 (1984) 5, 6, 8, 9, 10
United States v. *Allen*, 159 F.3d 832 (4th Cir. 1998) 12
United States v. *Boatwright*, 822 F.2d 862 (9th Cir. 1987) 11
United States v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985), cert. denied, 479 U.S. 1056 (1987) 11, 12, 13
United States v. *Conner*, 127 F.3d 663 (8th Cir. 1997) 11, 12
United States v. *Ford*, 22 F.3d 374 (1st Cir.), cert. denied, 513 U.S. 900 (1994) 11
United States v. *Hill*, 730 F.2d 1163 (8th Cir.), cert. denied, 469 U.S. 884 (1984) 7
United States v. *Kennedy*, 61 F.3d 494 (6th Cir. 1995), cert. denied, 517 U.S. 1119 (1996) 11
United States v. *Lamas*, 930 F.2d 1099 (5th Cir. 1991) .. 11
United States v. *Larsen*, 127 F.3d 984 (10th Cir. 1997), cert. denied, 522 U.S. 1140 (1998) 11

Cases—Continued: Page

United States v. *Lenoir*, 318 F.3d 725 (7th Cir.), cert. denied, 540 U.S. 841 (2003) 7
United States v. *Lindsey*, 877 F.2d 777 (9th Cir. 1989) ... 7
United States v. *Mejia*, 69 F.3d 309 12
United States v. *Reed*, 935 F.2d 641 (4th Cir.), cert. denied, 502 U.S. 960 (1991) 7
United States v. *Rodgers*, 924 F.2d 219 (11th Cir.), cert. denied, 501 U.S. 1221 (1991) 7
United States v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985) 12, 13
United States v. *Tejada*, 524 F.3d 809 (7th Cir. 2008) 5, 9, 11
United States v. *Thomas*, 955 F.2d 207 (4th Cir. 1992), cert. denied, 513 U.S. 828 (1994) 11
United States v. *Tibolt*, 72 F.3d 965 (1st Cir. 1995), cert. denied, 518 U.S. 1020 (1996) 7
United States v. *Vazquez De Reyes*, 149 F.3d 192 (3d Cir. 1998) 11
United States v. *Virden*, 488 F.3d 1317 (11th Cir. 2007) 5, 11
Warden v. *Hayden*, 387 U.S. 294 (1967) 7
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979) 6

Statutes:

18 U.S.C. 922(g)(1) 2
21 U.S.C. 841(a)(1) 1
21 U.S.C. 843(b) 2
21 U.S.C. 846 1

Miscellaneous: Page

Eugene Gressman, et al., *Supreme Court Practice* (9th ed. 2007) 6

In the Supreme Court of the United States

No. 09-1191

ANTWON DANIELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 590 F.3d 499.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2009. The petition for a writ of certiorari was filed on March 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to knowingly and intentionally possess a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 846; possessing heroin with the intent to distribute it, in violation of 21 U.S.C.

841(a)(1); possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1); and two counts of using a telephone to facilitate the commission of a drug offense, in violation of 21 U.S.C. 843(b). Pet. App. 4a-5a, 64a-65a. He was sentenced to 180 months of imprisonment. *Id.* at 5a, 66a. The court of appeals affirmed. *Id.* at 1a-63a.

1. a. Petitioner's conviction arose out of his association with members of a street gang on the south side of Chicago known as the "Four Corner Hustlers." Pet. App. 2a-5a. The Four Corner Hustlers were heavily involved in trafficking in heroin, cocaine, and crack cocaine. *Id.* at 2a. Petitioner's co-defendant Jerome Murray, who was the chief of the gang, bought wholesale quantities of drugs to sell to customers, who in turn resold the drugs to their own customers. *Id.* at 2a-4a. Petitioner purchased drugs from co-defendants Oluwadamilola Are and Julius Statham with Murray's assistance. *Ibid.*

On January 25-26, 2005, law enforcement officers recorded several phone calls among petitioner and his co-defendants regarding a monetary transaction. Pet. App. 3a-4a. Officers also heard petitioner and his co-defendants arrange two in-person meetings and observed those meetings during surveillance operations. *Ibid.* After the second meeting, law enforcement officers conducted a traffic stop of petitioner and seized 49.6 grams of heroin; not wanting to jeopardize their investigation, they did not arrest petitioner at that time. *Id.* at 4a. Following seizure of the drugs, petitioner called a co-defendant, who later met with Murray and other co-defendants at a McDonald's restaurant. *Ibid.* An undercover police officer posing as a homeless person overheard some of their conversation including

Murray's informing the others that "they got the shit," and stating that "that was the cost of doing business" and "better him than me." *Ibid.* Co-defendant Are instructed the others how to evade the police by changing meeting locations and driving erratically. *Ibid.*

b. On July 19, 2005, agents from the FBI and local police department went to petitioner's house to execute a warrant for his arrest. Pet. App. 6a. The team of nine officers and agents was aware that petitioner was being arrested for a drug conspiracy and that he had previously been arrested several times for drug and weapons offenses. *Ibid.* After knocking on petitioner's door, the leader of the arrest team was greeted by petitioner's wife, who allowed the team to enter and directed them to the master bedroom. *Ibid.* On the way to the master bedroom, the team conducted a brief protective sweep of the house, during which they found two children in another bedroom. *Ibid.* After bringing the children and their mother to the dining/living room area, the team handcuffed petitioner in the bedroom and brought him to the living room. *Ibid.*

Before advising petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), an FBI agent asked petitioner whether there were any weapons in the house, and petitioner answered that there was an AK-47 assault rifle under the dresser in the bedroom. Pet. App. 6a. After members of the team were unable to find the weapon under the dresser, they reported that fact to petitioner, who snickered and said that he must have gotten rid of the weapon. *Id.* at 6a-7a. Meanwhile, the officers continued to search the bedroom, eventually finding the weapon on the floor in a nearby closet *Id.* at 7a. The officers ended the search as soon as they located the weapon. *Ibid.*

At the same time that a member of the team was asking petitioner whether there were any weapons in the house, another member of the team was asking petitioner's wife to sign a consent-to-search form, which she did. Pet. C.A. Separate App. (S.A.) 54. The officers did not wait for petitioner's wife to sign the consent form before searching the bedroom for the weapon, and the district court found it unclear from the record whether petitioner's wife signed the form before the gun was recovered, after it was recovered, or while it was being recovered. S.A. 54-55. Following the recovery of the weapon, the arrest team conducted a full-scale search of the house pursuant to the consent obtained from petitioner's wife. 8/14/06 Suppression Hr'g Tr. (S.H.) 381.

2. Before his trial, petitioner moved to suppress the AK-47 assault rifle, arguing that the officers seized it pursuant to an illegal search. Pet. App. 6a-7a. After conducting a hearing, the district court denied petitioner's motion. *Id.* at 7a. The court first held that the search was justified by exigent circumstances because petitioner's wife and children were present in the house and could potentially have retrieved the weapon. S.A. 53-54. Although the court held that petitioner's wife validly consented to a search of the house, the court declined to uphold the seizure of the weapon on that basis because it was unclear whether she consented before, during, or after the search for the gun. S.A. 54-55. The court also concluded that the weapon was admissible because the team of arresting officers and agents would inevitably have discovered it based on petitioner's statements during the arrest. Pet. App. 7a.

3. The court of appeals upheld the district court's denial of petitioner's motion to suppress the AK-47. Pet. App. 6a-7a, 11a-13a. Petitioner argued that the "inevi-

table discovery" doctrine should apply only when the prosecution can "show that the lawful means which made discovery inevitable were being *actively pursued* prior to the occurrence of the illegal conduct." *Id.* at 11a (quoting *United States* v. *Virden*, 488 F.3d 1317, 1322 (11th Cir. 2007)). In rejecting petitioner's argument, the court of appeals relied on its prior decision in *United States* v. *Tejada*, 524 F.3d 809 (7th Cir. 2008), holding that such an approach would "confer a windfall on defendants because courts would have to suppress evidence merely because police were not seeking a warrant, even if a warrant would certainly have been issued." Pet. App. 12a (citing *Tejada*, 524 F.3d at 812-813). Instead, the court of appeals adhered to the rule articulated in *Tejada* that the inevitable discovery doctrine should apply "if the government proves that 'a warrant would certainly, and not merely probably, have been issued had it been applied for.'" *Ibid.* (quoting *Tejada*, 524 F.3d at 813). The court accordingly concluded that the AK-47 gun was properly admitted under the inevitable discovery doctrine because, based on petitioner's statement to the arrest team that the weapon was located in his bedroom, "it is reasonable to conclude that the officers would have sought a warrant to search the bedroom and, once they had, it is virtually certain that a warrant would have been issued." *Ibid.*

ARGUMENT

Petitioner asks this Court to review the court of appeals' and district court's application of the "inevitable discovery" doctrine this Court articulated in *Nix* v. *Williams*, 467 U.S. 431 (1984). Under that doctrine, if the government can establish that particular evidence unlawfully obtained would inevitably have been discovered

by lawful means, then the deterrence rationale of the exclusionary rule has so little basis that the evidence should not be suppressed. *Id.* at 444. Further review is not warranted in this case. Although petitioner is correct that some courts of appeals apply the inevitable discovery doctrine only when law enforcement was already in "active pursuit" of a lawful means of obtaining the unlawfully obtained evidence and other courts of appeals (including the court of appeals below) do not, this case is not an appropriate vehicle for resolving that issue because the seized weapon would be admissible under either approach and on an independent basis.

1. Petitioner argues that the courts below erred in holding that the AK-47 assault rifle was admissible under the inevitable discovery doctrine because the arrest team that seized the gun had not yet taken any steps to obtain a search warrant for the weapon at the time they conducted the search. As an initial matter, resolution of the question whether the gun should have been admitted under the inevitable discovery doctrine is unnecessary because the district court found in the alternative that the officers' search for the AK-47 was justified by exigent circumstances, and petitioner does not challenge that ruling in his petition. Although the court of appeals did not rule on the exigent circumstances issue, the district court's conclusion was correct, and it is sufficient to sustain the judgment. See, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals"); Eugene Gressman, et al., *Supreme Court Practice*, § 6.35, at 489 (9th ed. 2007); Gov't C.A. Br. 49-52.

This Court has held that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393-394 (1978). One exigency obviating the requirement of a warrant is the need to protect the safety of law enforcement officers or other persons in the vicinity of the searching officers. See *Warden* v. *Hayden*, 387 U.S. 294, 298 (1967); see also *Minnesota* v. *Olson*, 495 U.S. 91, 100 (1990); *United States* v. *Lenoir*, 318 F.3d 725, 730 (7th Cir.), cert. denied, 540 U.S. 841 (2003); *United States* v. *Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995), cert. denied, 518 U.S. 1020 (1996).

Here, the district court correctly found that exigent circumstances justified the warrantless search for the AK-47 because petitioner's wife would have had unimpeded access to the weapon as the members of the arrest team were leaving the house and could have used the weapon against them. As the court stated, "[o]nce the defendant informed the agents that an assault rifle was to be found in a particular area of the house, the officers certainly had a right to search that particular area." S.A. 53. Several courts of appeals have found that the presence of guns justifies searches and seizures on the basis of exigent circumstances. See, *e.g.*, *United States* v. *Reed*, 935 F.2d 641, 643 (4th Cir.), cert. denied, 502 U.S. 960 (1991); *United States* v. *Rodgers*, 924 F.2d 219, 222-223 (11th Cir.), cert. denied, 501 U.S. 1221 (1991); *United States* v. *Lindsey*, 877 F.2d 777, 780-782 (9th Cir. 1989); *United States* v. *Hill*, 730 F.2d 1163, 1170 (8th Cir.), cert. denied, 469 U.S. 884 (1984). An AK-47 assault rifle is a particularly dangerous weapon

and the officers were justified in searching for it in the bedroom after petitioner told them it was there. It is therefore admissible, regardless of the inevitable discovery doctrine because the actual search that uncovered it was constitutional.

2. Petitioner argues that the court of appeals erred in holding that the inevitable discovery doctrine can apply when law enforcement officers illegally obtain evidence *before* they initiate an "active pursuit" of legal means of obtaining the evidence. Petitioner is incorrect. In *Williams*, this Court explained that its adoption of the inevitable discovery doctrine was designed to avoid "put[ting] the government in a worse position" than it would have been in absent any error by investigators or officers "because the police would have obtained [the] evidence [in question] if no misconduct had taken place." 467 U.S. at 444. Thus, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means * * * then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." *Ibid.* (footnote omitted). Injecting an "active-pursuit" requirement as petitioner advocates would be inconsistent with that rationale because it would require the exclusion of evidence that would have been discovered in spite of any error.

The facts of this case illustrate that point. Even assuming that the arresting team did obtain the weapon through unlawful means—a point the government does not concede—there is no possibility that the government would not ultimately have obtained it through lawful means after petitioner told them that there was an AK-

47 assault rifle in the bedroom. Petitioner does not challenge the validity or admissibility of his statement to the police about the presence of the gun; and once the police were informed that such a dangerous weapon was present in the house, it is certain that they would have taken the necessary steps to find and seize that weapon lawfully, either through the consent of petitioner's wife or through a search warrant for the gun. Thus, application of a blanket active-pursuit requirement in this case would be inconsistent with the reasoning of *Williams* both because it would put the police in a worse position than they would have been in absent any error and because it would not serve as a deterrent to future unlawful conduct. See 467 U.S. at 444.

The court of appeals relied on circuit precedent requiring that, in order to invoke the inevitable discovery doctrine, the government must show that "a warrant would certainly, and not merely probably, have been issued had it been applied for." Pet. App. 12a (quoting *United States* v. *Tejada*, 524 F.3d 809, 813 (7th Cir. 2008)). The Seventh Circuit has explained that "[a] requirement of sureness—of some approach to certainty—preserves the incentive of police to seek warrants where warrants are required without punishing harmless mistakes excessively." *Tejada*, 524 F.3d at 813. Whether or not such a degree of certainty should be required in every case, the court of appeals' approach to applying the inevitable discovery doctrine in this case is consistent with this Court's decision in *Williams* and the rationales underlying the doctrine.

Petitioner argues that, without an active-pursuit requirement, the inevitable discovery doctrine would render the warrant requirement meaningless in cases where probable cause to search obviously exists. On the

contrary, as the *Williams* Court observed in rejecting an argument similar to petitioner's here, police officers will have "little to gain from taking dubious 'shortcuts' to obtain the evidence" when they know that the evidence can otherwise be obtained by lawful means, and the threats of departmental discipline and civil liability will provide "[s]ignificant disincentives" to intentional police misconduct. 467 U.S. at 445-446.

3. Even if petitioner were correct that the inevitable discovery doctrine requires pre-seizure active-pursuit of legal means of obtaining the evidence in question, that requirement was satisfied in this case. The team of arresting officers and agents was in active pursuit of obtaining the consent of petitioner's wife to search the house. The district court found that, at the same time that one member of the arrest team was asking petitioner in the living room whether any weapons were present in the house, another member was asking his wife in the dining room to sign a consent-to-search form, which she agreed to do. S.A. 54-55. The district court upheld the validity of petitioner's wife's consent in a ruling that petitioner did not challenge in the court of appeals[1] and does not challenge here. See S.A. 54. Accordingly, the arrest team was pursuing a lawful means of searching the house (*i.e.*, acquiring the consent of one of its inhabitants) *before* the officers searched for the weapon. After obtaining petitioner's wife's consent, the arrest team conducted a full-scale search of the house,

---

[1] Petitioner argued in the court of appeals only that the search for the gun was not consensual because his wife did not give her consent to a search until after the gun had been recovered; he did not challenge the validity of the consent. See Pet. C.A. Reply Br. 22.

see S.H. 381—a search that would inevitably have led to the recovery of the AK-47.[2]

4. As petitioner observes, the courts of appeals disagree about whether the inevitable discovery doctrine contains an active-pursuit requirement. Several courts have rejected the requirement. See, *e.g.*, *Tejada*, 524 F.3d at 812-813; *United States* v. *Vazquez De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998); *United States* v. *Larsen*, 127 F.3d 984, 987 (10th Cir. 1997), cert. denied, 522 U.S. 1140 (1998); *United States* v. *Kennedy*, 61 F.3d 494, 499-500 (6th Cir. 1995), cert. denied, 517 U.S. 1119 (1996); *United States* v. *Ford*, 22 F.3d 374, 377-378 (1st Cir.), cert. denied, 513 U.S. 900 (1994); *United States* v. *Thomas*, 955 F.2d 207, 210 (4th Cir. 1992), cert. denied, 513 U.S. 828 (1994); *United States* v. *Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987). In contrast, the Fifth, Eighth, and Eleventh Circuits have adopted it. See, *e.g.*, *United States* v. *Virden*, 488 F.3d 1317, 1322-1323 (11th Cir. 2007); *United States* v. *Conner*, 127 F.3d 663, 667-668 (8th Cir. 1997); *United States* v. *Cherry*, 759 F.2d 1196, 1204-1206 (5th Cir. 1985), cert. denied, 479 U.S. 1056 (1987). But see *United States* v. *Lamas*, 930 F.2d 1099, 1104 (5th Cir. 1991) (noting that it is an open question in the Fifth Circuit whether the government must satisfy the active-pursuit requirement in order to invoke the inevitable discovery doctrine). This case, however, is not an appropriate vehicle for resolution of that issue both because the officers' search for the weapon was justified by exigent circumstances and because the ar-

---

[2] Thus, petitioner's statement (Pet. 17) that "no steps were ever taken to attempt to secure a search warrant, nor did a warrant ultimately ever issue" in this case is beside the point. The law enforcement officers involved had no need to obtain a search warrant for petitioner's house after his wife consented to their searching the entire house.

rest team's pre-search request for petitioner's wife's consent to search the house satisfied any active-pursuit requirement that might apply.

In addition, the cases petitioner cites (Pet. 12-13) in which a court of appeals rejected the government's argument that it would inevitably have obtained a search warrant, because the court found that police had taken no steps toward obtaining a warrant at the time of the violation, are distinguishable. See *United States* v. *Allen*, 159 F.3d 832, 843-844 (4th Cir. 1998); *United States* v. *Mejia*, 69 F.3d 309, 320 (9th Cir. 1995); *Cherry*, 759 F.2d at 1206-1207; *United States* v. *Satterfield*, 743 F.2d 827, 845-847 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985).[3] Unlike in this case, there was no evidence in those cases that the police had taken any action before the violation reflecting their intent to obtain the evidence by lawful means. In *Allen*, the court of appeals affirmatively found that the officers would *not* have obtained a search warrant based on the officers' "normal routine" in cases involving unclaimed bags. 159 F.3d at 843. In *Mejia*, the court of appeals invalidated the district court's finding of a valid consent to search because the district court judge had improperly based that finding in part on the demeanor of a witness at a suppression hearing over which the judge did not preside. 69 F.3d at 314-319. Accordingly, for purposes of the court's

---

[3] In *Conner*, which petitioner also cites (Pet. 10), the officers did obtain search warrants, but the warrants were based in part on unlawfully obtained information. 127 F.3d at 667-668. In rejecting the government's invocation of the inevitable discovery doctrine, the Eighth Circuit relied on the district court's finding that the officers would not have sought the warrants without the tainted information and on the absence of evidence that the police were exploring any alternative investigatory approach. *Ibid.*

inevitable discovery determination, the conflicting testimony about whether the government had sought to conduct the search lawfully remained unresolved. In *Cherry*, although law enforcement officers sought consent to search, they did so only after committing the *Miranda* violation that was held by the district court to have invalidated the consent. 759 F.2d at 1202. And in *Satterfield*, the officers took their first steps toward conducting a lawful search of the premises in question after they had already seized evidence from the premises unlawfully. 743 F.3d at 845. Accordingly, none of those cases would have required that the evidence here be suppressed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

JUNE 2010